

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

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4 CHARLES E. MCDONALD,

Case No. 2:19-00261-CDS-DJA

5 Plaintiff,

ORDER

6 v.

7 WARDEN BRIAN WILLIAMS¹, *et al.*,

8 Defendants.

9

Petitioner Charles E. McDonald filed an amended petition for writ of habeas corpus under 28 U.S.C. § 2254 (ECF No. 14 (“Petition”)). This matter is before the Court for adjudication on the merits of the remaining grounds in the Petition. For reasons discussed below, the Court denies the Petition and denies McDonald a certificate of appealability.

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I. BACKGROUND

11 On September 1, 2010, Deborah Lee (“Lee”) withdrew \$600 from her bank account and
 12 went to another store called Plus Mail to purchase a money order in the amount of \$415. ECF
 13 No. 16-1 at 69-71. Lee put the money order and remaining cash in her wallet. *Id.* at 73. On the
 14 same day after purchasing the money order, Lee went to a nearby clothing store. *Id.* at 74. While
 15 at the clothing store, Lee stood looking at blouses at a rack and had her purse over her arm. *Id.*
 16 Lee testified at trial that a tall black man approached her and asked whether a size large blouse
 17 was within her reach. *Id.* As Lee reached towards the blouse on the rack, the man reached into
 18 her purse, grabbed Lee’s wallet, and ran out of the store. *Id.* at 75. Lee’s wallet was pink with a
 19 playboy bunny symbol. *Id.* at 72. Surveillance video depicted the man that approached Lee
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¹ It appears from the state corrections department’s inmate locator page that Petitioner is incarcerated at the Southern Desert Correctional Center (“SDCC”). See <https://ofdsearch.doc.ny.gov/form.php> (retrieved May 2022 under identification number 96753). The department’s website reflects that William Hutchings is the warden of that facility. See https://doc.ny.gov/Facilities/SDCC_Facility/ (retrieved May 2022). At the end of this order, the Court directs the Clerk of the Court to substitute Petitioner’s current immediate physical custodian, William Hutchings, as Respondent for the prior Respondent Brian Williams, pursuant to, *inter alia*, Rule 25(d) of the Federal Rules of Civil Procedure.

1 running from the store with the same wallet. *Id.* at 87. Lee spoke to police officers and air units
 2 were dispatched. *Id.* at 79.

3 Ivra Baldwin (“Baldwin”) testified at trial that McDonald came to Baldwin’s apartment
 4 on September 1, 2010. ECF No. 16-1 at 117. McDonald asked Baldwin to cash a \$415 money order
 5 and in exchange McDonald would give Baldwin \$50. *Id.* at 119-121. After cashing the money order
 6 at Moneytree, Baldwin gave the money to McDonald. *Id.* The State presented still images from
 7 surveillance video and Baldwin identified McDonald as the person in the images. *Id.* at 124.
 8 Samuel Wright (“Wright”) testified at trial that upon questioning from police officers, he
 9 identified McDonald as the individual in the surveillance video. ECF No. 16-1 at 167-169. At trial,
 10 Wright identified McDonald in a still image from the surveillance video based on his body type.
 11 *Id.* at 170.

12 Following trial, the jury returned a verdict finding McDonald guilty of larceny from a
 13 person, victim 60 years of age or older and possession of stolen property. ECF No. 16-7. In
 14 January 2012, the Eighth Judicial District Court (“state court”) entered the judgment of
 15 conviction and sentenced McDonald under the small habitual criminal statute to a term of 8 to
 16 20 years. *Id.* McDonald appealed, and the Nevada Supreme Court affirmed the conviction. ECF
 17 Nos. 16-8, 16-18.

18 In February 2013, McDonald filed a state petition for writ of habeas corpus. ECF No. 16-
 19 23. The state court denied the petition and McDonald appealed. ECF Nos. 16-25, 16-30. The
 20 Nevada Supreme Court found that the state court’s failure to appoint post-conviction counsel
 21 prevented meaningful litigation of the petition and reversed and remanded for appointment of
 22 counsel. ECF No. 17-4. McDonald filed a supplemental petition and following oral argument, the
 23 state court denied the petition. ECF Nos. 17-13, 17-17. On appeal, the Nevada Court of Appeals
 24 affirmed in part and reversed in part, remanding the case for a second time for an evidentiary
 25 hearing. ECF No. 17-27. Upon remand and following an evidentiary hearing, the state court
 26 denied the petition. ECF Nos. 18-1, 18-2. The Nevada Court of Appeals affirmed. ECF No. 18-12.

27 In February 2019, McDonald initiated the instant federal habeas corpus proceeding. ECF
 28 No. 1. The Court appointed counsel and McDonald filed an amended petition. ECF Nos. 8, 14.

1 Respondents moved to dismiss Ground 3 as unexhausted. ECF No. 23. The Court denied
 2 Respondents' motion to dismiss and deferred ruling on the cause and prejudice argument and
 3 merits analysis of Ground 3 until a determination on the merits. ECF No. 30.

4 **II. LEGAL STANDARD**

5 **a. Review under the Antiterrorism and Effective Death Penalty Act**

6 28 U.S.C. § 2254(d) sets forth the standard of review generally applicable in *habeas corpus*
 7 cases under the Antiterrorism and Effective Death Penalty Act (AEDPA):

8 An application for a writ of *habeas corpus* on behalf of a person in custody
 9 pursuant to the judgment of a State court shall not be granted with respect to any
 10 claim that was adjudicated on the merits in State court proceedings unless the
 adjudication of the claim –

11 (1) resulted in a decision that was contrary to, or involved an unreasonable
 12 application of, clearly established Federal law, as determined by the Supreme
 Court of the United States; or
 13 (2) resulted in a decision that was based on an unreasonable determination of the
 facts in light of the evidence presented in the State court proceeding.

14 28 U.S.C. § 2254(d). A state court decision is contrary to established Supreme Court precedent,
 15 within the meaning of § 2254(d)(1), “if the state court applies a rule that contradicts the
 16 governing law set forth in [Supreme Court] cases” or “if the state court confronts a set of facts
 17 that are materially indistinguishable from a decision of [the Supreme] Court.” *Lockyer v. Andrade*,
 18 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell v.*
 19 *Cone*, 535 U.S. 685, 694 (2002)). A state court decision is an unreasonable application of
 20 established Supreme Court precedent under § 2254(d)(1), “if the state court identifies the
 21 correct governing legal principle from [the Supreme] Court’s decisions but unreasonably applies
 22 that principle to the facts of the prisoner’s case.” *Id.* at 75 (quoting *Williams*, 529 U.S. at 413). “The
 23 ‘unreasonable application’ clause requires the state court decision to be more than incorrect or
 24 erroneous. The state court’s application of clearly established law must be objectively
 25 unreasonable.” *Id.* (internal citation omitted) (quoting *Williams*, 529 U.S. at 409-10).

26 The Supreme Court has instructed that a “state court’s determination that a claim lacks
 27 merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the
 28 correctness of the state court’s decision.” *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting

1 *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Court has stated that “even a strong case
 2 for relief does not mean the state court’s contrary conclusion was unreasonable.” *Id.* at 102
 3 (citing *Lockyer*, 538 U.S. at 75); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal
 4 quotation marks and citations omitted) (describing the standard as “difficult to meet” and
 5 “highly deferential standard for evaluating state-court rulings, which demands that state-court
 6 decisions be given the benefit of the doubt”).

7 **b. Standard for Evaluation of an Ineffective Assistance of Counsel Claim**

8 In *Strickland*, the Supreme Court propounded a two-prong test for analysis of ineffective
 9 assistance of counsel claims requiring Petitioner to demonstrate that: (1) the counsel’s
 10 “representation fell below an objective standard of reasonableness[;]” and (2) the counsel’s
 11 deficient performance prejudices Petitioner such that “there is a reasonable probability that, but
 12 for counsel’s unprofessional errors, the result of the proceeding would have been different.”
 13 *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). Courts considering an ineffective
 14 assistance of counsel claim must apply a “strong presumption that counsel’s conduct falls within
 15 the wide range of reasonable professional assistance.” *Id.* at 689. It is Petitioner’s burden to show
 16 “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed . . .
 17 by the Sixth Amendment.” *Id.* at 687. Additionally, to establish prejudice under *Strickland*, it is
 18 not enough for Petitioner to “show that the errors had some conceivable effect on the outcome of
 19 the proceeding.” *Id.* at 693. Rather, errors must be “so serious as to deprive [Petitioner] of a fair
 20 trial, a trial whose result is reliable.” *Id.* at 687.

21 Where a state court previously adjudicated the ineffective assistance of counsel claim
 22 under *Strickland*, establishing the court’s decision was unreasonable is especially difficult. *See*
 23 *Richter*, 562 U.S. at 104-05. In *Richter*, the Supreme Court clarified that *Strickland* and § 2254(d)
 24 are each highly deferential, and when the two apply in tandem, review is doubly so. *See id.* at 105;
 25 *see also Cheney v. Washington*, 614 F.3d 987, 995 (9th Cir. 2010) (internal quotation marks omitted)
 26 The Court further clarified, “[w]hen § 2254(d) applies, the question is not whether counsel’s
 27 actions were reasonable. The question is whether there is any reasonable argument that counsel
 28 satisfied *Strickland*’s deferential standard.” *Richter*, 562 U.S. at 105.

1 III. DISCUSSION

2 a. Grounds 1 and 2

3 In Ground 1, McDonald alleges that trial counsel rendered ineffective assistance for
 4 failing to investigate mental health issues and request a competency exam. ECF No. 14 at 7-11.
 5 McDonald argues that in March 2012, five months after the instant challenged conviction,
 6 McDonald's counsel, Dan Winder ("Winder"), in another state criminal case investigated his
 7 mental health issues, requested a competency hearing, and as a result, McDonald was found
 8 incompetent. *Id.* at 7-8. He asserts that he has a history of mental illness and has been diagnosed
 9 with mental illness since 2000, has been found incompetent numerous times, and was
 10 involuntarily committed to a psychiatric hospital in 2010. *Id.* at 9. He further asserts that when
 11 he first met with his trial counsel, he was being held in a unit specifically for those in need of
 12 mental health treatment and that he told his trial counsel that he had a history of mental illness,
 13 including PTSD, mood disorder, severe depression, and hearing voices. *Id.* at 9-10. In addition,
 14 McDonald's significant other, Mary Shelman ("Shelman"), told McDonald's counsel to have
 15 McDonald evaluated. *Id.*

16 In Ground 2, McDonald alleges that trial counsel rendered ineffective assistance for
 17 failing to investigate McDonald's mental health issues thereby depriving him of an insanity
 18 defense. ECF No. 14 at 11-14. A psychiatrist examined McDonald during post-conviction
 19 proceedings and found that McDonald "has a complex of psychiatric disorders well documented
 20 in his treatment record that support his chronic paranoia, exacerbated by drug use and
 21 noncompliance with medication treatment . . . had he been competent to form a defense, he
 22 might have . . . formulate[d] an insanity . . . defense." *Id.* at 12. McDonald asserts that he was
 23 incapable of developing the *mens rea* necessary due to his mental illness and delusions at the time
 24 of the charged crime. (*Id.* at 13.)

25 The Nevada Supreme Court held:

26 The district court held an evidentiary hearing on this issue, and found counsel was
 27 not deficient. Specifically, the district court found McDonald failed to demonstrate
 28 counsel should have known McDonald was incompetent or should have done
 further investigation into McDonald's mental health issues. McDonald appeared
 to understand counsel during meetings, was able to discuss strategies, and gave
 appropriate responses to counsel's questions. Further, counsel testified McDonald
 understood the gravity of the situation, he understood the evidence against him,

1 and offered information to assist in his defense. The district court found McDonald
 2 acted and responded appropriately in court.

3 The district court also found McDonald failed to demonstrate prejudice because
 4 McDonald failed to demonstrate he was incompetent at the time of trial. The
 5 district court found the subsequent finding of incompetency did not demonstrate
 6 he was incompetent during this trial. Further the doctor who examined him during
 7 the postconviction proceedings could not draw a conclusion “either way whether
 8 [McDonald] was competent or not competent at the time of trial.”

9 Substantial evidence supports the decision of the district court. McDonald failed
 10 to demonstrate counsel should have known he did not have sufficient ability to
 11 consult with counsel with a reasonable degree of understanding or that he did not
 12 have a rational or factual understanding of the proceedings against him. Further
 13 McDonald failed to demonstrate he was incompetent at the time of trial, or had
 14 counsel investigated his mental health, he would have been able to pursue an
 15 insanity defense or a plea of guilty but mentally ill.

16 ECF No. 18-12 at 3-4. The Nevada Supreme Court’s ruling was neither contrary to nor an
 17 objectively unreasonable application of clearly established law as determined by the United
 18 States Supreme Court.

19 Defense counsel has a “duty to make reasonable investigations or to make a reasonable
 20 decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691. In an
 21 ineffectiveness of counsel case, “a particular decision not to investigate must be directly assessed
 22 for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s
 23 judgments.” *Id.* In assessing counsel’s investigation, the Court must conduct an objective review
 24 of counsel’s performance, measured for “reasonableness under prevailing professional norms.” *Id.*
 25 at 688. This includes a context-dependent consideration of the challenged conduct as seen “from
 26 counsel’s perspective at the time.” *Id.* at 689. *See Wiggins v. Smith*, 539 U.S. 510, 523 (2003).
 27 Furthermore, “strategic choices made after thorough investigation of law and facts relevant to
 28 plausible options are virtually unchallengeable.” *Strickland*, 466 U.S. at 690.

29 **i. Ineffective Assistance re: Competency**

30 The Nevada Supreme Court’s determination that McDonald failed to demonstrate that
 31 trial counsel was deficient for his failure to investigate McDonald’s competency to stand trial
 32 and request a competency evaluation was not unreasonable. Counsel’s failure to move for a
 33 competency hearing violates a petitioner’s right to effective assistance of counsel when “there
 34 are sufficient indicia of incompetence to give objectively reasonable counsel reason to doubt the

1 defendant's competency, and there is a reasonable probability that the defendant would have
 2 been found incompetent to stand trial had the issue been raised and fully considered." *Stanley v.*
 3 *Cullen*, 633 F.3d 852, 862 (9th Cir. 2011). At the evidentiary hearing, trial counsel testified that he
 4 had an impression that McDonald "was indulging in some potential self-medication using
 5 narcotic substances," based on McDonald's weight loss, but that he was able to discuss strategy
 6 with McDonald, that McDonald appeared to understand the information trial counsel was
 7 conveying to him, that McDonald realized the gravity of the situation he was facing, and that
 8 McDonald provided appropriate responses to questions posed. ECF No. 18-1 at 45-47. Although
 9 McDonald's significant other, Shelman, testified that she informed trial counsel of McDonald's
 10 mental health issues, trial counsel testified that he did not recall interacting with Shelman. *Id.* at
 11 59-60, 84-88. Trial counsel further testified as follows:

12 My general practice is if I have family members, friends, individuals saying, hey,
 13 Person X has some serious mental health issues that needs to be looked into, what
 14 I generally do is have my private investigator speak to that person, get a little more
 15 information. If it has teeth, I will then – what I've done many, many times is have
 16 the individual sign a release so I can go get mental health records . . . And if those
 17 records support what's going on – excuse me, what we've been told, proceed
 18 accordingly. I sometimes request for an evaluation, sometimes I ask them to go to
 19 competency court.

20 ECF No. 18-1 at 59.

21 In addition, trial counsel described McDonald as "very lucid before we were going to
 22 trial," that "[McDonald] knew exactly what he was up against," that they "had a very pointed
 23 conversation," but, "he had given me ostensible justifications for why he was doing what he was
 24 doing, primarily because he didn't want to get habitualized." *Id.* at 63. During the trial,
 25 McDonald was out of custody and employed. *Id.* at 44, 54-56. As stated by the Nevada Supreme
 26 Court, McDonald acted and responded appropriately in court. ECF No. 18-12 at 3. McDonald
 fails to overcome the strong presumption that his counsel's conduct "falls within the wide range
 of reasonable professional assistance." *Strickland*, 466 U.S. 689. The Nevada Supreme Court's was
 not objectively unreasonable in determining trial counsel was not deficient.

27 Further, the Nevada Supreme Court reasonably determined that McDonald failed to
 28 establish prejudice. McDonald failed to demonstrate a reasonable probability that he would

1 have been found incompetent to stand trial had the issue been raised. Although McDonald was
 2 found incompetent as a result of competency proceedings in a separate criminal state case for a
 3 four-month period from March 29, 2012 to August 7, 2012, such finding does not demonstrate
 4 that McDonald was incompetent during his three-day trial starting on October 11, 2011. ECF
 5 Nos. 15-21, 17-13 at 25-27. McDonald demonstrated a rational and factual understanding of the
 6 proceedings against him through trial as well as an ability to consult with his attorney. ECF No.
 7 17-17 at 4. At the evidentiary hearing, Dr. Roitman testified as an expert witness on behalf of
 8 McDonald. (ECF No. 18-1 at 3.) Dr. Roitman examined McDonald during post-conviction
 9 proceedings and could not “draw a conclusion either way whether he was competent or not
 10 competent at the time of trial.” *Id.* at 12. Accordingly, McDonald fails to demonstrate that he was
 11 prejudiced by trial counsel’s failure to request competency proceedings. The Nevada Supreme
 12 Court’s determination was not an unreasonable application of the prejudice prong of *Strickland*.
 13 McDonald is not entitled to habeas relief on Ground 1.

14 **ii. Ineffective Assistance re: Insanity Defense**

15 The Nevada Supreme Court’s ruling that McDonald failed to demonstrate that had
 16 counsel investigated his mental health, he would have been able to pursue an insanity defense or
 17 a plea of guilty but mentally ill was not unreasonable. As stated previously, McDonald did not
 18 overcome the strong presumption that trial counsel’s conduct “falls within the wide range of
 19 reasonable professional assistance” regarding trial counsel’s decision not to investigate
 20 McDonald’s mental health issues. *Strickland*, 466 U.S. 689. Further, McDonald failed to
 21 demonstrate that there is a reasonable probability that the outcome of trial would have been
 22 different had McDonald pursued an insanity defense.

23 Under Nevada law, criminal defendants are presumed to be legally sane, and, to prevail
 24 with an insanity defense, must overcome that presumption with a preponderance of the
 25 evidence. *See Williams v. State*, 885 P.2d 536, 538 (1994). Nevada recognizes the defense of legal
 26 insanity and applies the *M’Naghten* rule. *See, e.g., Miller v. State*, 911 P.2d 1183, 1185 (1996). Under the
 27 *M’Naghten* rule, the jury determines whether the defendant “knew the nature and quality of [his]
 28 acts, had the capacity to determine right from wrong or whether [he] was doing wrong when

[he] committed the crime." *See Clark v. State*, 588 P.2d 1027, 1029 (1979). "To qualify as being legally insane, a defendant must be in a delusional state such that he cannot know or understand the nature and capacity of his act, or his delusion must be such that he cannot appreciate the wrongfulness of his act, that is, that the act is not authorized by law." *Finger v. State*, 27 P.3d 66, 84–85 (2001). "The fact that a person had mental health problems did not necessarily mean that he or she could meet the *M'Naghten* test for insanity." *Id.* at 72.

The Nevada Supreme Court considered Dr. Roitman's evaluation that McDonald "has a complex of psychiatric disorders well documented in his treatment record that support his chronic paranoia, exacerbated by drug use and noncompliance with medication treatment." (ECF No. 20-2 at 19.) Dr. Roitman's evaluation set forth McDonald's "mental deterioration during the events that led to the instant offense" providing that McDonald "felt sexually attracted" to Lee at the clothing store, noticed Lee's pink playboy bunny wallet in her purse, and became "convinced that the eye of the bunny was a camera that the woman purposely positioned to focus on [McDonald]," then McDonald heard his dead fiancé's voice telling him to "take the wallet with the camera to [Baldwin] and tell him to get rid of it." *Id.* at 5.

The Nevada Supreme Court, however, also considered the evidence at trial wherein McDonald deceived or distracted Lee during the commission of the crime by asking her to reach for an item on the rack while he grabbed her wallet in her purse. ECF No. 16-1 at 73. The State highlighted the flight instruction at closing and presented video evidence of McDonald running after taking the wallet. *See* ECF No. 16-5 at 11. Additionally, evidence at trial demonstrated that McDonald used a third-party individual to cash the money order. The State argued at closing that McDonald had Baldwin cash the money order because police were looking for someone that matched McDonald's description. *Id.* at 13. Such evidence does not support the contention that McDonald did not know or understand the nature and capacity of his act, or that his delusion was such that he did not appreciate the wrongfulness of his act. *See Finger*, 27 P.3d at 84. Accordingly, the Nevada Supreme Court reasonably determined that McDonald failed to demonstrate a reasonable probability that the presentation of an insanity defense would have changed the outcome of the trial. McDonald is not entitled to habeas relief on Ground 2.

1 b. Ground 3

2 In Ground 3, McDonald alleges that trial counsel rendered ineffective assistance for
 3 failing to investigate or present any mitigation at McDonald's sentencing. ECF No. 14 at 15 -17.
 4 He asserts that because trial counsel failed to order McDonald's medical records, the state court
 5 was not aware of McDonald's diminished capacity at sentencing. *Id.* at 16. The Court held that
 6 Ground 3 is subject to dismissal as procedurally defaulted unless McDonald can show cause and
 7 prejudice under *Martinez*.² ECF No. 30. The Court, however, finds that Ground 3 is not
 8 substantial under *Martinez*. *See Martinez*, 566 U.S. at 14.

9 McDonald's argument that trial counsel did not present mitigation at sentencing related
 10 to McDonald's mental illness is belied by the record. At sentencing, trial counsel highlighted
 11 that McDonald "did lead a clean and straight and narrow life and then due to incidents outside
 12 of his control, for lack of a better term, the wheels came off and it led him down a spiral of self-
 13 medication regarding his mental health issues." ECF No. 16-6 at 8. Further, trial counsel noted
 14 that McDonald received mental health treatment and requested "a strict inpatient program" as a
 15 reasonable hope for success. *Id.* at 10. In addition, McDonald addressed the state court and
 16 referenced his mental health issues. *Id.* at 7. The presentence investigation report also reviewed
 17 McDonald's mental health history, which was provided to the sentencing court. ECF No. 20-5 at
 18 4.

19 McDonald's argument that trial counsel would have explained to the state court that
 20 McDonald's crimes were a result of mental illness exacerbated by his drug addiction if trial
 21 counsel investigated McDonald's mental illness fails because trial counsel presented such
 22 mitigation argument at sentencing. McDonald faced adjudication as a "large" habitual criminal
 23 under Nev. Rev. Stat. § 207.010(1)(b), which has three possible sentences: life imprisonment

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² To establish cause and prejudice for a trial-level ineffective assistance of counsel claim under
 26 *Martinez*, a petitioner must show that:

27 (1) Post-conviction counsel performed deficiently; (2) there was a reasonable probability that,
 28 absent the deficient performance, the result of the post-conviction proceedings would have
 been different, and (3) the underlying ineffective assistance of counsel claim is a substantial
 one, which is to say that the prisoner must demonstrate that the claim has some merit.

1 without the possibility of parole, life imprisonment with the possibility of parole after 10 years,
2 and 25 years imprisonment with the possibility of parole after 10 years. In support of seeking
3 sentencing under the large habitual statute, the State argued that McDonald had five prior
4 felony convictions and that five of the convictions were committed while McDonald was on
5 supervised release. ECF No. 16-6 at 5. The State further argued that McDonald violated parole
6 when it was granted to him. *Id.* The state court, however, sentenced McDonald under the small
7 habitual statute to a term of 8 to 20 years. ECF No. 16-7. The Court concludes that Ground 3 is
8 not substantial under *Martinez*.

9 In addition, McDonald fails to demonstrate that post-conviction counsel performed
10 deficiently or a reasonable probability that the result of the post-conviction proceedings would
11 have been different had post-conviction counsel raised the claim. Trial counsel in fact presented
12 mitigation argument related to McDonald's mental illness at sentencing. Post-conviction
13 counsel, therefore, was not deficient for foregoing a claim that lacked merit. Had post-conviction
14 counsel presented the claim that trial counsel was ineffective at sentencing, there is not a
15 reasonable probability the result of the post-conviction proceedings would have been different
16 because the state district court has broad discretion at sentencing. See *Randell v. State*, 846 P.2d
17 278, 280 (Nev. 1993). The State highlighted McDonald's multiple prior felonies that were
18 committed while McDonald was on supervised release and that McDonald violated parole when
19 it was granted to him at sentencing. Because trial counsel presented mitigation argument, given
20 the broad discretion in sentencing enjoyed by the state courts in Nevada, and McDonald's
21 criminal record, there isn't a reasonable probability that further mitigation argument regarding
22 McDonald's mental illness would have changed the result of the post-conviction proceedings.
23 Accordingly, the Court denied Ground 3 as procedurally defaulted.

24 **c. Ground 4**

25 In Ground 4, McDonald alleges that trial could rendered ineffective assistance for failure
26 to show Exhibit 8, a still image of video footage of the crime scene, to McDonald before telling
27 him to go to trial. ECF No. 14 at 17-18. He asserts that trial counsel advised McDonald to go to
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1 trial because the jury would not be able to identify him, and trial counsel failed to inform
 2 McDonald that video footage existed. *Id.* at 17. The Nevada Court of Appeals held:

3 McDonald argues his counsel was ineffective for advising McDonald to reject a plea
 4 offer and proceed to trial without showing McDonald the video footage of the
 5 crime scene. McDonald asserts counsel advised him the jury would not be able to
 6 identify him as the perpetrator and that is why he decided to reject the plea offer.
 McDonald states he would have accepted a plea offer from the State had he viewed
 the video footage ahead of trial. McDonald failed to demonstrate his counsel's
 performance was deficient or resulting prejudice.

7 McDonald did not allege counsel misadvised him regarding the law pertaining to
 8 his charges, *cf. Lafler v. Cooper*, 566 U.S. ___, 132 S. Ct. 1376, 1384 (2012) (explaining
 9 that counsel's performance was objectively unreasonable due to informing the
 10 petitioner of an incorrect legal rule). Moreover, during the preliminary
 11 examination the victim could only describe the physical characteristics of the
 12 perpetrator of the crime and did not identify McDonald as the person who
 13 committed the crime, and accordingly, McDonald fails to demonstrate that
 14 counsel's advice regarding use of an identity defense at trial was the performance
 15 of an objectively unreasonable counsel. In addition, McDonald did not
 16 demonstrate a reasonable probability there was a plea offer from the State he
 17 would have accepted absent ineffective assistance of counsel, the State would not
 18 have withdrawn it in light of intervening circumstances, and the district court
 19 would have accepted such an offer. *See id.* ___, 132 S. Ct. at 1385. Therefore, we
 20 conclude the district court did not err in denying this claim.

21 ECF No. 17-27 at 3-4. The Nevada Court of Appeal's rejection of McDonald's ineffective assistance
 22 claim was neither contrary to nor an objectively unreasonable application of *Strickland*.

23 McDonald argues that the state appellate court applied the wrong standard and
 24 misinterpreted the expert's conclusions, and the Court should, therefore, review the claim *de*
 25 *novo*. ECF No. 42 at 15. In *Lafler*, the allegation was that petitioner had rejected favorable plea
 26 offers "after his attorney convinced him that the prosecution would be unable to establish his
 27 intent to murder" because the victim "had been shot below the waist." *Lafler*, 566 U.S. at 161. The
 28 Supreme Court confirmed that the *Strickland* test applies to the plea bargaining process when a
 defendant rejects a plea offer and elects to go to trial. *Id.* at 163. Thus, other than stating that
 counsel's advice was concededly deficient, the Supreme Court in *Lafler* did not provide any
 standards under which lower courts are to evaluate the sufficiency of a trial counsel's
 performance in rendering plea advice. *See id.* at 174 (stating that deficient performance had been
 conceded by all parties, so there is no need to address what type of performance would be
 required to find counsel to be constitutionally ineffective). The Nevada Court of Appeals, here,

1 analogized to *Lafler* noting that McDonald did not allege that trial counsel provided incorrect
 2 advice regarding the law, but nonetheless applied the *Strickland* standard.

3 The Court is not convinced that trial counsel's performance fell below the *Strickland*
 4 standard as applied in the plea bargaining context. In the plea advice context, “[c]ounsel cannot
 5 be required to accurately predict what the jury or court might find, but he can be required to
 6 give the defendant the tools he needs to make an intelligent decision.” *Turner v. Calderon*, 281 F.3d
 7 851, 881 (9th Cir. 2002). Trial counsel testified at the evidentiary hearing that he showed
 8 McDonald the video footage and the still images from the video footage recounting that Exhibit
 9 8 had a “crystal clear” image of McDonald’s face with the wallet also in view. ECF No. 18-1 at 50-
 10 51. Trial counsel further testified that he did not advise McDonald to reject the plea and go to
 11 trial. *Id.* at 53.

12 The state appellate court’s determination that McDonald failed to demonstrate prejudice
 13 was not unreasonable. As noted by the Nevada Court of Appeals, McDonald did not
 14 demonstrate a reasonable probability that if there was a plea offer from the State he would have
 15 accepted absent ineffective assistance of counsel. Trial counsel further testified that he made a
 16 “last-ditch effort” and discussed a potential plea deal with McDonald on the day of jury selection
 17 recounting his discussion with McDonald, “[f]irst I had argued that if you go to trial you’re
 18 going to be looking at in all probability getting habitualized based upon your record and the
 19 facts in this case and you’ll probably be maxed out,” and “[s]econd I had argued that if we go to
 20 trial and we lose, which I was very clear that I anticipated that happening, . . . that the second
 21 that jury comes back and says guilty you will be placed in custody on a no bail hold pending
 22 your sentencing.” ECF No. 18-1 at 55.

23 Moreover, as the Supreme Court has stated, “[w]hen a state prisoner asks a federal court
 24 to set aside a sentence due to ineffective assistance of counsel during plea bargaining, our cases
 25 require that the federal court use a ‘doubly deferential’ standard of review that gives both the
 26 state court and the defense attorney the benefit of the doubt.” *Burt v. Titlow*, 134 S.Ct. 10, 13
 27 (2013). Because the Nevada Court of Appeals’ decision denying relief is reasonable and
 28 supported by the record, McDonald is not entitled to habeas relief on Ground 4.

1 d. Ground 5

2 In Ground 5, McDonald alleges that his state court conviction was on insufficient
 3 evidence. ECF No. 14 at 18-19. He asserts that the witnesses were not able to positively identify
 4 McDonald as the person who took the wallet. *Id.* at 18. He further asserts that one of the
 5 witnesses, Wright, only identified McDonald on the surveillance video from his physical stature
 6 and body type, not his facial features. *Id.* The Nevada Supreme Court held:

7 McDonald contends that the evidence presented at trial was insufficient to
 8 support the jury's finding of guilt because the victim did not identify him and
 9 another witness identified him by his build rather than his face. We disagree, and
 10 conclude that the evidence, when viewed in the light most favorable to the State,
 11 is sufficient to establish guilt beyond a reasonable doubt as determined by a
 12 rational trier of fact. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also Wilkins v.*
State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980).

13 The jury heard testimony that the victim, Deborah Lee, purchased a money order
 14 and placed it into a long pink wallet. Lee testified that later, while shopping, she
 15 was distracted by a tall black man who then removed the wallet from her purse
 16 and fled the scene. Irv Baldwin testified that McDonald approached him shortly
 17 after the robbery and offered him \$50 to cash a money order, the same order that
 18 Lee had purchased. The jury saw video footage from a security camera which
 19 showed a tall black man escaping the scene on foot with a pink wallet visibly on
 20 his person. McDonald was identified by a witness as the person in the video footage
 21 based upon his build and stature.

22 The jury could reasonably infer from the evidence presented that McDonald
 23 committed the larceny and approached Baldwin to cash the money order on his
 24 behalf. Although McDonald contends that his face was never identified, it is for the
 25 jury to determine the weight and credibility to give conflicting testimony, and the
 26 jury's verdict will not be disturbed on appeal where, as here, substantial evidence
 27 supports the verdict. *See Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); *see also McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). Circumstantial evidence
 28 alone may sustain a conviction. *See Wilkins*, 96 Nev. at 374, 609 P.2d at 313. Because
 29 the jury made a reasonable determination, McDonald's first argument is without
 30 merit.

31 ECF No. 16-18 at 2. The Nevada Supreme Court's ruling was neither contrary to nor an
 32 objectively unreasonable application of clearly established law as determined by the United
 33 States Supreme Court.

34 When a habeas petitioner challenges the sufficiency of evidence to support his
 35 conviction, the Court reviews the record to determine "whether, after viewing the evidence in
 36 the light most favorable to the prosecution, *any* rational trier of fact could have found the
 37 essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319

(1979) (emphasis in original). “[F]aced with a record of historical facts that supports conflicting inferences,” the court “must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.” *Jackson*, 443 U.S. at 326. The reviewing court must respect the exclusive province of the fact-finder to determine the credibility of witnesses, to resolve evidentiary conflicts, and to draw reasonable inferences from proven facts. *United States v. Hubbard*, 96 F.3d 1223, 1226 (9th Cir. 1996). The Supreme Court has emphasized that claims of insufficiency of the evidence “face a high bar in federal habeas proceedings” *Coleman v. Johnson*, 566 U.S. 650, 651 (2012) (per curiam). When the deferential standards of AEDPA and *Jackson* are applied together, the question for decision on federal habeas review is whether the state court’s decision unreasonably applied the *Jackson* standard to the evidence at trial. See, e.g., *Juan H. v. Allen*, 408 F.3d 1262, 1274–75 (9th Cir. 2005) (citations omitted).

As noted by the Nevada Supreme court, Lee testified at trial that after getting a money order, a tall black man approached her in a clothing store and took her wallet from her purse. Baldwin testified that on the same day that Lee’s wallet was taken, McDonald offered him \$50 to cash a money order that was Lee’s money order. In addition, Baldwin identified McDonald in surveillance video taken at or near the scene. Another individual, Wright, identified McDonald to police officers as well as at trial.

Viewing the evidence in the light most favorable to prosecution, any rational trier of fact would have found the essential elements of larceny from a person, victim 60 years of age or older beyond a reasonable doubt. There was sufficient evidence identifying McDonald as the individual who took the victim’s wallet. Based on a review of the record of evidence submitted at trial, the Court concludes that a rational jury could have found the essential elements of the crime beyond a reasonable doubt. McDonald is not entitled to habeas relief on Ground 5.

IV. CERTIFICATE OF APPEALABILITY

This is a final order adverse to McDonald. Rule 11 of the Rules Governing Section 2254 Cases requires the Court to issue or deny a certificate of appealability (“COA”). Therefore, the Court has *sua sponte* evaluated the claims within the petition for suitability for the issuance of a

1 COA. See 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002). Pursuant to
2 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner “has made a substantial
3 showing of the denial of a constitutional right.” With respect to claims rejected on the merits, a
4 petitioner “must demonstrate that reasonable jurists would find the district court’s assessment
5 of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)
6 (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will
7 issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the
8 denial of a constitutional right and (2) whether this Court’s procedural ruling was correct. *Id.*

9 Applying these standards, this Court finds that a certificate of appealability is
10 unwarranted.

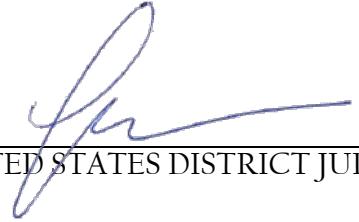
11 **V. CONCLUSION**

12 It is therefore ordered that Petitioner Charles E. McDonald’s amended petition for writ of
13 habeas corpus under 28 U.S.C. § 2254 (ECF No. 14) is denied.

14 It is further ordered that a certificate of appealability is denied.

15 It is further ordered that the Clerk of the Court is directed to substitute William
16 Hutchings for Respondent Brian Williams, enter judgment accordingly, and close this case.

17 DATED this 1st day of June, 2022.

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UNITED STATES DISTRICT JUDGE